STATE OF MICHIGAN

COURT OF APPEALS

JAMES STICKNEY,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED
June 1, 2001

No. 217488
Genesee Circuit Court
LC No. 97-057337-CL

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this reverse discrimination action. We affirm.

Plaintiff, a white male, contends that he established a valid claim of reverse race discrimination under Michigan's Civil Rights Act (CRA), MCL 37.2202 *et seq*; MSA 3.548(202) *et seq*, and Title VII's 42 USC 1981 and 42 USC 1983. Bruce Blackmon, an African-American male, was promoted to the position of Dual Waste Collection Foreman instead of plaintiff. Plaintiff now contends that the trial court erred in granting defendant's motion for summary disposition.

On appeal, a trial court's grant of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record to determine whether defendant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337; *Radke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court may rely on affidavits, pleadings, depositions, or any other documentary evidence in deciding whether a genuine issue of material fact exists. *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

The analysis of a discrimination claim is the same under the CRA and Title VII's 42 USC 1981 and 42 USC 1983. *Kresnak v City of Muskegon Heights*, 956 F Supp 1327, 1334 (WD

Mich, 1997); see also *Allen v Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997). Under § 202(1) of the CRA, an employer may not:

> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.

In the instant case, plaintiff claims that defendant intentionally discriminated against him. Intentional discrimination may be established by direct or indirect evidence. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997).

Michigan courts often resort to federal precedent for guidance in analyzing discrimination claims. *Id*. The Sixth Circuit Court of Appeals has defined direct evidence as evidence that, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor." *Graham v Ford*, 237 Mich App 670, 676-677; 604 NW2d 713 (1999), citing *Harrison*, *supra* at 610, quoting *Kresnak*, *supra* at 1335. In *Harrison*, this Court offered the example that racial slurs by the decisionmaker would constitute direct evidence sufficient to survive a motion for summary disposition. *Id*. In a case involving direct evidence of discrimination, the plaintiff has the burden of persuading the trier of fact that the employer acted with illegal discriminatory intent. *Graham*, *supra* at 677. The plaintiff must establish direct proof that the discriminatory intent was causally related to the decisionmaker's employment action. Moreover, this Court had held that direct evidence discrimination cases ordinarily must be submitted to the finder of fact. *Id*.

Plaintiff's argument regarding direct evidence of discrimination stems from the fact that defendant had an Affirmative Action Policy at the time Blackmon was promoted. Plaintiff contends that Ed Henry, the decisionmaker, filled out an employee demographic sheet declaring that his selection for the foreman position was in compliance with the goals set by defendant's Affirmative Action Policy. Defendant argues that its Affirmative Action Policy does not involve quotas and/or preferences. As part of the Commitment Statement for defendant's Affirmative Action Plan, Woodrow Stanley, the mayor, stated the following:

> As mayor of the City of Flint, I am firmly committed to equal employment opportunity and the merit principle. It shall be the City's policy and practice that every good faith effort to achieve the goals of this plan shall be consistent with the merit principle. The merit principle is that personnel actions shall be based on

> uniformly applied criteria of relative fitness to perform the duties of the position sought or held, and not upon considerations of race, color, religion, national origin, sex, age, handicap, marital status, sexual preference, height or weight.

Plaintiff does not cite to any provision of the Affirmative Action Plan which causally supports his claim of discrimination. Contrary to plaintiff's unsupported assertion, compiling and recording statistical information regarding the composition of workforce alone, including percentage of minority, female, and handicapped employees, does not lead to the conclusion that an employer is engaging in discriminatory practices. This Court holds that nothing in the plan can be construed as direct evidence of discrimination.

Plaintiff also contends that the affidavit of Joseph Pilara is direct evidence of defendant's discriminatory animus. Pilara, a former Assistant Sewer Maintenance Supervisor in the Sewer and Water Department, stated that he was told by his superiors that there was an affirmative action program in place and he "was responsible for providing preferential treatment to African-American employees with respect to promotions to management/non-management and, specifically, [he] was responsible for reducing underutilization of African-Americans in management/non-management positions within the DPW [Department of Public Works]." Pilara further indicated that during the oral assessment process, he interviewed both plaintiff and Blackmon. He stated that both gave mediocre performances during their interviews and that Blackmon's interviewing skills were not superior to those of plaintiff.

Defendant contends, and we agree, that Pilara was not involved in the decisionmaking process. Pilara did, according to his affidavit, assist in the process of evaluating candidates with regard to their eligibility scores, but did not participate in the actual promotion decisions. In *McDonald v Union Camp Corp*, 898 F2d 1155, 1161 (CA 6, 1990), the Sixth Circuit Court of Appeals held that the plaintiff must prove that the ultimate decisionmaker acted with discriminatory animus. Here, Pilara's allegations of discrimination by others is not supported by fact. Accordingly, the trial court did not err in granting defendant's motion for summary disposition based on plaintiff's claim of direct evidence discrimination.

A plaintiff may also establish discrimination with circumstantial evidence. To demonstrate a prima facie case of reverse discrimination based on circumstantial evidence, a plaintiff must prove:

> (i) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against [white] men;
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> (ii) that the plaintiff applied and was qualified for an available promotion;
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> (iii) that, despite plaintiff's qualifications, he was not promoted; and
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> (iv) that an [African American] employee of similar qualifications was promoted. [*Allen, supra* at 433.]

The burden of proof in a discrimination case brought under the CRA is as follows: first, the plaintiff must establish a prima facie case of discrimination. *Lytle v Malady (On Rehearing)*,

458 Mich 153, 172-173; 579 NW2d 906 (1998); *Rollert*, *supra* at 538; *Harrison*, *supra* at 607. Plaintiff contends he established a prima facie case of reverse discrimination. Addressing the first element, plaintiff argues that the existence of the Affirmative Action Plan and Pilara's affidavit prove that defendant is the unusual employer that discriminates against whites. As stated above, the Affirmative Action Plan is innocuous and does not require a system of quotas or preferences. Pilara stated in his affidavit that as a part of the Affirmative Action Plan he had been required to hire minority candidates over more qualified non-minority candidates. Pilara does not state, however, that he knows this to be true in the instant case.

Defendant, on the other hand, offers evidence that there was no discriminatory animus in its hiring procedure. It is undisputed that a supervisor is authorized to hire any of the top three candidates from an eligibility list. The first candidate hired was a white male. Of the candidates hired from the 1994 eligibility list, four were white and two were African-American. Although this is a close issue, when viewed in the light most favorable to plaintiff, we hold that plaintiff established the first element of his prima facie case. In addition, plaintiff established the other elements of a prima facie case of reverse discrimination: he was qualified for the position; despite his qualifications he was not promoted; and, Blackmon, an African-American employee of similar qualifications, was promoted. *Allen*, *supra* at 433.

After establishing a prima facie case, a presumption of discrimination arises. *Lytle*, *supra* at 173. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id*.; *Rollert*, *supra* at 538; *Harrison*, *supra* at 608. Defendant argues that it clearly established legitimate, nondiscriminatory reasons for its employment action. All eligible candidates were interviewed and the same questions were asked of each candidate. The supervisor evaluated each candidate based upon their test scores, interviews, and other relevant qualifications. Henry testified that plaintiff did not interview as well as other eligible candidates. Plaintiff had a history of disciplinary actions, including an instance where he disobeyed an order from Henry, the primary decisionmaker in this case.[1] The first two candidates promoted had each been performing the position in a provisional capacity for approximately six months. Henry testified that he did not promote plaintiff because he felt there were better candidates to fill the position.

Plaintiff did not argue on appeal that defendant's legitimate, non-discriminatory reasons for the employment action were meritless. Thus, under the analysis, the plaintiff is then afforded an opportunity to demonstrate, by a preponderance of the evidence, that the employer's articulated nondiscriminatory reason was mere pretext. *Lytle*, *supra* at 174; *Victorson v Dep't of Treasury*, 439 Mich 131, 143; 482 NW2d 685 (1992); *Rollert*, *supra* at 538; *Harrison*, *supra* at 608.

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[1] Plaintiff also notes that Blackmon was subject to two disciplinary actions. One was for disobeying a work-related instruction and the second was for failure to complete a work assignment. Neither, however, involved Henry, the supervisor who made the promotion decision.

The trial court held that plaintiff failed to demonstrate by a preponderance of the evidence that defendant's articulated nondiscriminatory reason was mere pretext. In so holding, the court noted: that the supervisor had the authority to hire any of the top three candidates; the test scores were not the sole criteria for making promotion decisions; no evidence was presented to refute defendant's claim that Blackmon interviewed better than plaintiff; and, Blackmon worked as the foreman in a provisional capacity before being promoted.

Plaintiff contends that the trial court erred in failing to consider Pilara's affidavit in the determination of whether defendant's reasons for hiring Blackmon over plaintiff were pretextual. In support of this argument, plaintiff cites *Scott v Goodyear Tire & Rubber Co*, 160 F3d 1121, 1129 (CA 6, 1998) and *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 356 (CA 6, 1998), for the proposition that discriminatory statements made by non-decisionmakers can establish a circumstantial case of discrimination. We hold that *Scott* and *Ercegovich* are distinguishable on the facts. In each case, the non-decisionmakers who made the potentially discriminatory comments were "policy makers" and "managers." *Scott*, *supra* at 1129; *Ercegovich*, *supra* at 356. Pilara was an Assistant Sewer Maintenance Supervisor and did not engage in policy decisions. Accordingly, the trial court did not err in holding that Pilara's affidavit did not serve to demonstrate that defendant's proffered nondiscriminatory reasons for not promoting plaintiff were mere pretext.

Plaintiff also contends that defendant's argument that Blackmon interviewed better than plaintiff is inherently subjective and should not be dispositive at summary disposition. Plaintiff argues that *Grano v Dep't of Development of the City of Columbus*, 699 F2d 836, 837 (CA 6, 1983), stands for the proposition that subjective evaluations are inherently suspect and should not be the basis for summary judgment. In *Grano*, the Sixth Circuit Court of Appeals held that although subjective evaluations are troubling, they are not illegal per se and the "ultimate issue in each case is whether the subjective criteria were used to disguise discriminatory action." *Id*. If defendant's sole basis for promoting Blackmon over plaintiff was that Blackmon performed better on a subjective interview, plaintiff's argument may have merit. However, in this case, plaintiff had an adverse disciplinary history with the decisionmaker and Blackmon was already acting as the foreman in a provisional capacity. Thus, the subjective rationale is strongly supported by objective criteria. This Court holds that plaintiff failed to establish that defendant's articulated nondiscriminatory reasons for its employment action were mere pretext. Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder